IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

JOSEPH J. KOPKE and HENRY HLAVACEK,
Petitioners,

vs.

THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinions of the court below.

The opinion of the court below will be found in the record and in the official reports of that State (376 Ill. 171) and in the North Eastern Reporter (33 N. E. (2nd) 216) and is appended herewith (p. 27).

II.

Jurisdiction.

The judgment was entered in the trial court (the Criminal Court of Cook County, Illinois), but a supersedeas was allowed by the Supreme Court of Illinois

and, as appears from the record herein, that Honorable Court affirmed the judgment on February 18, 1941. Under the rules that judgment was not made final until a petition for rehearing was denied on April 8, 1941. The Supreme Court of Illinois has the record, a certified transcript of which is filed herewith.

We respectfully submit that this Honorable Court has decided that if a petition for rehearing is entertained by the higher court of a state, its judgment does not become final until the petition for rehearing is denied (*Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, 23-25; *Citizens' Bank of Michigan City, Ind.* v. *Opperman,* 249 U. S. 448, 450; *Ohio Public Service Co.* v. *State of Ohio ex rel. Fritz,* 275 U. S. 12; *Chicago G. W. R. Co.* v. *Basham,* 249 U. S. 164; *Iowa-DesMoines Nat. Bank* v. *Stewart,* 283 U. S. 813; *Iowa-DesMoines Nat. Bank* v. *Bennett,* 284 U. S. 239).

Where the court of last resort, as the Illinois Supreme Court in the case at bar, affirms a final judgment of an inferior state court, the judgment of the highest court is the one reviewable (*Lessieur* v. *Price,* 12 How. 59, 72, 13 L. Ed. 893; *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 126, 52 S. Ct. 546, 76 L. Ed. 1010).

In the case at bar, the federal question was specifically raised in the motion for new trial (Abst. 138) in the trial court and was reasserted in the assignment of errors made in the State Supreme Court (Abst. 141), and therefore we respectfully submit that the federal question was timely and properly raised, even though the Illinois Supreme Court did not expressly pass upon the federal question (*Chicago, Burlington & Quincy R. Co.* v. *City of Chicago,* 166 U. S. 226, 231, 232; *Johnson* v. *New York Life Ins. Co.,* 187 U. S. 491, 495; *International Harvester*

Co. v. *Missouri ex inf. Attorney General,* 234 U. S. 199, 206, 207; *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 154).

Of course, we realize that this Honorable Court must confine itself to the specific federal question properly raised in the state courts (*Dewey* v. *DesMoines,* 173 U. S. 193, 197, 198).

But, we respectfully submit, the failure of the State court to pass upon the federal question is not conclusive upon this Honorable Court (*Chicago, Burlington & Quincy Ry.* v. *Illinois ex rel. Drainage Com'rs,* 200 U. S. 561, 580, 581; *West Chicago St. Railroad Co.* v. *Illinois ex rel. City of Chicago,* 201 U. S. 506, 519, 520; *Wood* v. *Chesborough,* 228 U. S. 672, 676-680). This Honorable Court will determine the inquiry for itself (*Abie State Bank* v. *Bryan,* 282 U. S. 765, 773; *Broad River Power Co.* v. *South Carolina ex rel. Daniel,* 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, 282; *Patterson* v. *State of Alabama,* 294 U. S. 600, 602; *Ward* v. *Board of County Com'rs of Love County, Okla.,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24, 25).

We respectfully submit that we are not requesting this Honorable Court to re-examine facts tried by the jury. Our respectful contentions concern the legal effect and sufficiency of the facts and the theory upon which the case was submitted below and are questions of law for this Honorable Court (*Kaufman* v. *Tredway,* 195 U. S. 271, 273; *Dower* v. *Richards,* 151 U. S. 658, 667; *Graham* v. *Gill,* 223 U. S. 643, 645; *St. Louis, San Francisco & T. Ry. Co.* v. *Seale,* 229 U. S. 156, 161; *St. Louis I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 277; *Chicago, M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 474; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 673; *Union Pacific R. Co.* v. *Huxoll,* 245 U. S. 535, 538; *Baltimore &*

Ohio Southwestern R. Co. v. *Burtch,* 263 U. S. 540, 543; *Brinkmeier* v. *Missouri Pac. R. Co.,* 224 U. S. 268, 270; *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 242; *Missouri K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 639; *Smiley* v. *Kansas,* 196 U. S. 447, 454; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 280; *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, 124; *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398; *Mammoth Mining Co.* v. *Grand Central Mining Co.,* 213 U. S. 72, 73).

Our respectful claim is that the highest court of our State has refused to pass upon the federal question, which was properly raised, which is a question of substance not heretofore determined by this Honorable Court. As your Honors know, the use of certiorari to correct error is not infrequent in criminal cases.

So, in the case at bar, there can be no question but what there has been:

(1) A final judgment or decree;

(2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;

(3) The judgment or decree was rendered in a "suit" involving a "case" or "controversy";

(4) The case presents a substantial federal question;

(5) The federal question sought to be reviewed was properly raised and preserved in the state courts; and

(6) The decision of the highest court of the state does not rest upon a state ground which inde-

pendently and adequately supports the judgment or decree.

So, as your Honors will perceive, the question in the case at bar narrows itself down to whether or not a substantial federal question is submitted, which question, of course, is for decision upon the entire record in the light of the decisions of this Honorable Court and in the exercise of discretion and the supervisory power of this Honorable Court.

Of course, we realize, as was said by Mr. Chief Justice White in *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308:

> "Mere allegation of a Federal question will not suffice; there must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction."

We respectfully submit that the inquiry whether a substantial Federal question is involved in the case at bar is not dependent entirely upon the merits of the case as they now appear from this Petition. If your Honors will take jurisdiction, we respectfully submit that the merits of our case will more fully appear. We only ask to have a chance to print the record and show the injustice done, upon which injustice we respectfully claim the writ.

III.

Statement of the case.

Petitioners Joseph J. Kopke and Henry Hlavacek were convicted in the Criminal Court of Cook County and sentenced to the penitentiary for assault with intent to commit mayhem. The indictment (consisting of six counts)

charges various assaults and conspiracy. The jury found a verdict (Abst. 6) under the fourth count (Abst. 4), charging that the petitioners kicked the complaining witness with the intent to disable his testicles.

The petitioners are officials of the Amalgamated Meat Cutters Union, 638, affiliated with the American Federation of Labor. The complaining witness, Czeslaw Mikolajczyk (Abst. 12), is a butcher by trade and had been a member of the union, working at various markets on extra jobs secured through the union. Prior to the conflict he had withdrawn from the union and was not eligible to work as a union man. On the day in question, Saturday, January 6, 1940, he was working as an extra in a butcher shop known as the General Market, 3708 26th Street, Chicago. This shop was conducted by two partners, John Matousek (Abst. 40), and Richard Dusek (Abst. 46), who testified on behalf of the People. The market was supposed to be a union shop and employed a number of butchers. The partners belonged to an employer's association. There is a dispute in the testimony as to the nature of the work being done by the complaining witness. A telephone call was received at union headquarters that a non-union man was working at the market. The petitioners went over to investigate. After securing permission, they went through the store into the rear. They found the complaining witness in a back room, where the controversy took place. Those in the market were not in a position to see what transpired in the back room. According to the complaining witness, Kopke pointed a gun at him in the rear room and kicked him between his legs (Abst. 14).

Both petitioners testified (Abst. 53 and 64) and denied the use or possession of any gun and denied kicking. They said that the complaining witness became excited

when being questioned about what he was doing in and about the butcher shop and that he lifted up a shovel. Kopke said that he hit the complaining witness with his hand at the time in order to protect himself and to prevent the use of the shovel.

The People did not claim that there was any permanent disablement. Disfigurement is not alleged or claimed.

Charles Chval, who described himself as an osteopathic physician and obstetrician and retired minister (Abst. 28), testified to an examination made of the complaining witness. The petitioners produced Dr. Baker (Abst. 81) and Hatton, the X-ray man (Abst. 79) from the Cook County Hospital, where the State's Attorney sent the complaining witness three days after the trouble. Dr. Glasser gives his expert opinion in the way of an affidavit (Abst. 130), that the means supposed to have been used are incapable of producing the result alleged to have been intended, and that the complaining witness is a malingerer.

Those who were in the butcher shop in addition to the proprietors, who testified for the People, are Aldrich Drahotusky (Abst. 33), and Mary Melichar (Abst. 43). Anton Lazansky (Abst. 49), a butcher employed on that day, testified on behalf of the petitioners. Many others are shown to have been present, but were not called. The petitioners surrendered themselves to the police and made statements to them and to the State's Attorney. Some effort was made by the prosecutor to show variations but we contend that said statements were substantially in accordance with the testimony of the petitioners at the trial.

The petitioners established their good reputation by a number of witnesses (Abst. 84 to 89) and no witness was called by the State upon this subject.

IV.

Specification of errors.

The petitioners respectfully contend:

1. Prior to the trial a written motion to quash was made (Abst. 8) and overruled. A motion was also made for a bill of particulars (Abst. 10) and overruled. These rulings are complained of.

2. It is also contended that the evidence is insufficient, and the court erred in the matter of instructions. The petitioners sought to have the prosecutor elect. This also was refused. Rulings as to the admission and exclusion of evidence are alleged to be error. Affidavits were filed and it is contended that the court erred in denying the motion for new trial and in entering judgment.

3. That each of the errors deprived the defendants of due process of law as guaranteed by the constitution and laws of this State and the 14th Amendment to the Constitution of the United States.

V.

ARGUMENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

A.

There was a total failure of proof below, admitting, for the sake of argument, that the complaining witness was injured in the manner claimed by him.

Petitioners have been sentenced to the penitentiary on verdicts finding them guilty of assault with intent to commit mayhem. We review briefly the nature of the crime involved by the following quotation from May's Criminal Law, Third Edition, Section 217, page 208:

"Mayhem is defined by Blackstone (4 Bl. Com. 205) as 'the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary.' Amongst these members were included a finger (*Bowen* v. *S.*, 24 Tex. App. 542, 7 S. W. 247), an eye (*Chick* v. *S.*, 7 Humph. (Tenn.) 161), a foretooth, and those parts which are supposed to give courage. But cutting off the ear or the nose is not mayhem at common law, since the loss of these tends only to disfigure, but not to weaken (4 Bl. Com. 205. See also 2 Bish. New Cr. Law, 1001, and notes). It has been held that a statutory mayhem, based on the common law offence, is not committed by cutting the throat (*Rex* v. *Lee*, 1 Leach, 3d ed. 71), or breaking the skull (*Foster* v. *P.*, 50 N. Y. 598, M. 529),

there being no deprivation of any member. The injury must be permanent in order to constitute the offence (*State* v. *Briley*, 8 Porter (Ala.), 472.) * * * The offence is now almost universally, in this country, defined by statute, and generally treated as an aggravated assault. In many States the statutes cover cases not embraced by common law, as the biting off an ear or the slitting of the nose, if the injury amounts to a disfigurement (*State* v. *Girkin*, 1 Ired. (N. C.) 121; *State* v. *Ailey*, 3 Heisk. (Tenn.) 8).

"Mayhem, at common law, was punishable in some cases as a felony,—an eye for an eye, and a tooth for a tooth,—and in others as a misdemeanor (4 B. Com. 205; *Commonwealth* v. *Newell*, 7 Mass. 245, C. 109, 482. Compare *Adams* v. *Barratt*, 5 Ga. 404; *State* v. *Thompson*, 30 Mo. 470; *Canada* v. *C.*, 22 Grat. (Va) 899). But if the offence is made a felony in this country, the punishment is defined by statute. It is doubtless, generally, a misdemeanor, unless done with intent to commit a felony (*Ibid.;* Stephen's Dig. Cr. Law, cc. 25 and 26).

"Under the statute in New York, the injury must have been done by 'premeditated design' and 'of purpose.' Hence, if done as the result of an unexpected encounter, or of excitement produced by the fear of bodily harm, the offence is not committed. (*Godfrey* v. *People*, 63 N. Y. 207.) So under the statute, 5 Henry IV, c. 5, malice *prepense* was said by Lord Coke to mean 'voluntarily and of set purpose.' (Coke, 3 Inst. 62. See also *Godfrey* v. *People, ante; Molette* v. *State*, 49 Ala. 18; *State* v. *Jones*, 70 Ia. 505, 30 N. W. 750; *State* v. *Cody*, 18 Or. 506, 23 P. 891, 24 P. 895.)"

In *People* v. *Saylor*, 319 Ill. 205, it was held that castration comes within the statute on mayhem. That case involved the completed crime. In *Dahlberg* v. *People*, 225

Ill. 485, this Honorable Court held that the defendant could not be guilty of an attempt to commit mayhem because the means (red pepper) could not have accomplished the crime.

In the case at bar, the disablement was not accomplished. If Kopke had been able to disable the testicles of the complaining witness by means of a kick, it may be that very slight evidence in addition to the result would be sufficient to conclude that he so intended.

We respectfully quote from the *Dahlberg* case (488):

> "It is quite evident from the testimony in this record that it was not in plaintiff in error's power, and could not have been her intention, to have the pepper remain in Grace's eyes any longer than it would take him to remove it in the ordinary course of events. * * * It can hardly be contended that the pepper thrown by plaintiff in error, and which affected Hinton so slightly would if it had struck the eye of William Grace, for whom it was apparently intended, have destroyed or even seriously injured his eyesight.
>
> "We do not find it necessary to consider the question as to whether plaintiff in error could be convicted of an attempt at mayhem, if, when she threw the pepper, she thought she had employed adequate means and intended to destroy the eyesight of William Grace, when, in fact, she used inadequate means for the purpose. There is no testimony in the record tending to show that she so believed and intended, and while in criminal cases the criminal intention may be manifested by the circumstances connected with the perpetration of the offense without any positive testimony as to intention, it certainly could not be inferred because plaintiff in error used inadequate means that she intended to use adequate means."

The *Yuskauskas, Saylor* and *Connors* cases, in which

the convictions were affirmed, are easily distinguished from the case at bar.

We respectfully submit that the specific intent required was not proved in the case at bar, by either direct or circumstantial evidence. There is nothing in the evidence from which it can be inferred that Kopke had in his mind the specific intent required, even assuming for the purpose of argument that he kicked the complaining witness. Dr. Glasser, a specialist, gave as his opinion on the motion for new trial (Abst. 130) that such a result as was alleged to have been intended is impossible. This, we submit, is common knowledge.

In *People* v. *Yuskauskas*, 268 Ill. 328, it was insisted that the evidence did not show that the crime was committed with premeditation and that there was no intent on the part of the defendant to commit the crime of mayhem. He bit off part of the nose. We quote (331):

> "Plaintiff in error, who was a witness in his own behalf, did not deny the assault upon his wife or that he committed the crime with which he was charged, but testified that his wife had been going out with other men and he went to the house with the purpose of frightening her and beating her up, and that he had no intention of biting off her nose or injuring her in any manner. The question whether plaintiff in error had the intent to commit the crime with which he was charged was a question for the jury among other facts in the case, and while the plaintiff in error testified on the trial that he did not intend to injure her, the jury evidently thought that his actions spoke louder than words. The verdict was justified by the evidence. In fact, it can hardly be seen how the jury could have found otherwise than that plaintiff in error was guilty as charged. Criminal intent may be manifested by the circumstances connected with the perpetration of the offense without any positive testimony as to such intent. (*Dahlberg* v. *People*, 225 Ill. 485; *McCoy* v. *People*,

> 175 *id.* 224; *Crosby* v. *People*, 137 *id.* 325.) In the latter case it was said, on page 336 of the opinion: 'It is not necessary to a conviction, however, that an express intention need be proved. Every sane man is presumed to intend the natural and probable consequences of his act, and it has been uniformly held, therefore, that the intent may be inferred from the acts of the person charged with crime as well as by words or declarations.'"

We respectfully submit that in the case at bar there were no such actions that could speak louder than words, even if the testimony of the complaining witness be taken as true. A kick does not indicate that the petitioner intended to maim or disable the testicles. As a matter of fact, such result could hardly be expected. Such a kick might cause intense pain, and is no doubt a cruel act, but it does not follow that the kicker intends to permanently disable the testicles.

We respectfully quote from an affidavit (Abst. 130) by Dr. Julius M. Glasser, which was filed by leave of court, and read and considered in disposing of the motion for new trial. There were no counter affidavits filed. First permit us to call attention to the qualifications of Dr. Glasser as an expert, as shown by the affidavit (Abst. 130); a specialist who after his graduation from Northwestern University pursued studies in Europe and is on the staff of numerous hospitals:

> "This affiant states that the male organs, including the testicles, are so situated and arranged upon the body of a man as to afford a natural protection from injury. This protection is afforded by the location of same and the fact that they are freely movable. This affiant, assuming a hypothetical person clothed in the manner described by the witnesses as to the complaining witness, is of the opinion that it is a physical impossibility to inflict any injury with the foot by kicking, which injury would deprive the

> complaining witness of the sexual organs, particularly the testicles. This affiant is of the opinion that it is a physical impossibility to accomplish the severance of any part of said organs by means of kicking or beating or any such external violence as is described in the above case."

Although this medical opinion was not formally made a part of the record until after the verdict was returned, your Honors will recognize the opinion as one embraced in common knowledge. As was said in *People* v. *Bentley*, 357 Ill. 82, 103:

> "This court will take judicial notice of laws of science and of nature and of the universal experience of mankind. (*Hicks* v. *Silliman*, 93 Ill. 255.)"

In the case at bar, permit us to assume for the purpose of argument that the kick caused a permanent injury to the testicles. (No such claim is made.) The petitioner, if confronted with a mayhem charge, could claim that he did not intend such a result. The intent would be a question for the jury under proper instructions. Such a defense would do him no good on a lesser charge involving injury, for the acts would speak for themselves. When the law seeks to exact a more severe penalty for a crime such as mayhem requiring a specific intent, he should be heard to say he had no such intent. His actions should be permitted to speak for him.

In *Rankin* v. *State*, 139 S. W. (2d) 811, the eye of the complaining witness was so badly injured by a bottle that it had to be removed. The Court of Criminal Appeals of Texas discusses the matter of intent and notices the difference between cases in which the mayhem is accomplished and those in which the means failed.

In *People* v. *Connors*, 246 Ill. 9, the defendant was convicted of mayhem. He tore an ear from the complaining

witness. His defense was an alibi and the elements of the offense are not discussed.

We respectfully submit that there is a total failure of proof as to Hlavacek. If Kopke was not guilty, Hlavacek could not be (*People* v. *Walker,* 361 Ill. 482; *People* v. *Wyherk,* 347 Ill. 28). Hlavacek can not be said to have aided or joined in any conspiracy for the purpose of committing mayhem in the absence of proof (*Lamb* v. *People,* 96 Ill. 73).

The statute under which these petitioners were convicted, omitting parts not applicable, is as follows:

> "An assault with intent to commit * * * mayhem * * * shall subject the offender to imprisonment. * * *" (Ill. Rev. Stat. 1937, Chap. 38, Sec. 58, Par. 23.)

An assault is defined by our statute as follows:

> "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 55, Par. 20.)

The mayhem statute, omitting the parts not applicable, is as follows:

> "Whoever, with malicious intent to maim * * * cuts off or disables a limb or other member of another person shall be imprisoned * * *." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 448, Par. 207.)

We omitted the disfigurement from the statute because there is nothing about disfigurement in the indictment. The parts involved in the case at bar are not ordinarily exposed to view.

There is a note in 40 L. R. A. (N. S.) 1132, entitled:

> "Mayhem as depending upon the means or instrument used to inflict the injury."

from which we quote:

> "At common law mayhem was defined as the violent deprivation of one of the use of such of his members as may render him less able in fighting to defend himself or annoy his adversary. 26 Cyc. 1595.
>
> "The 40 L. R. A. (N. S.) statutes upon the subject, however, have extended the crime to include injuries which would not have that effect, but result merely in disfiguring the person.
>
> "In some early English cases, it is held that to support a charge of maiming under their statute, the injury must have been inflicted by means of some instrument."

In *Harris* v. *Commonwealth*, 150 Va. 580, 142 S. E. 354, reported in 58 A. L. R. 1316, with a note, the defendant struck complaining witness with a stick, inflicting a slight bruise over the collar bone. The skin was not broken. After citing authorities to the effect that the wound did not come within the mayhem statute, the court said (1318):

> "It is probable that the reason for this seemingly narrow construction of the word 'wound' can be thus explained: First, that statutes defining new crimes should be strictly construed, and also because of the manifest disposition to charge and prosecute as felonies under this statute offenses which theretofore had been classed as simple assaults—misdemeanors. The true purpose and meaning of the statute was doubtless conceived to be to define and punish as felonies those acts which had theretofore been considered misdemeanors only in those cases where it also appeared that there was the felonious intent to maim, disfigure, disable, or kill."

Our point is that mayhem is a particularly heinous crime, carrying a heavy penalty. Other assaults should not be held to be with intent to commit the crime in the absence of clear proof of the specific intent required.

There is an element of deliberation and premeditation as to the purpose of the cutting to constitute mayhem. In some of the old statutes and in some states now, a lying in wait is required.

Cases decided in this State under the above quoted section 58 indicate the policy of the law and, although not directly in point, illustrate our contention.

In *Moore* v. *People,* 146 Ill. 600, the defendant was convicted of assault with intent to commit manslaughter. The State contended that that came within "other felony." In holding that the statute did not apply, this Honorable Court said (601):

> "To constitute the offenses, or any of them, as defined in this statute, the intent must be established, and whilst not necessary that this shall be done by direct evidence, such as threats and the like, as it may be inferred from the facts and circumstances proven, yet the specific intent is necessary to complete the offense. An assault with intent to commit murder, rape, mayhem, robbery or larceny is one which necessarily depends on deliberation, and as all these offenses which are specifically named by that section are those which require deliberation and premeditation it becomes a question of construction whether the term 'or other felony' can include any offense other than one committed with deliberation or premeditation. When a section, so far as it particularizes, has reference entirely to offenses committed with a deliberate intent, general language referring to any other felony in like manner has reference to offenses committed with premeditation or deliberate intent,—that is, with what is included as legal premeditation or deliberation."

Another case illustrating that the specific intent must be manifest is that of *People* v. *Ryan,* 239 Ill. 410, holding that the evidence was not sufficient to convict a pickpocket of *assault with intent to rob* in a case where the

attempt at *stealing from the person* failed. Also see *Turley* v. *People*, 188 Ill. 628, where there was a failure of proof as to specific intent in an assault to rob.

B.

By permitting the prosecutor to proceed to trial upon numerous improperly joined counts and allowing the State to introduce incompetent evidence, the petitioners were deprived of due process of law.

Of course, your Honors know that when labor officials are accused of crime, questions collateral to the charge and bound to be considered by the jury and prejudices are liable to influence the result. The prosecution has no right to use a scatter-shot gun and convict on general principles. They have no right to increase an ordinary assault charge to one as serious as mayhem. Your Honors have a record of the background of these petitioners. It is difficult to believe that they could be so indifferent to all decency as to walk into a store where they were well known, intent upon the commission of such a terrible crime. Such conduct was unnecessary and would be foolhardy. At any rate, the petitioners can now claim that the evidence was highly conflicting, the proof of their guilt is not clear and they had a right to a trial free from the many prejudicial errors shown. It is contended that they did not receive due process of law as guaranteed by the constitution and laws of this State and the Fourteenth Amendment to the Constitution of the United States.

C.

The entire prosecution, we respectfully submit, is but a mask resulting in cruel and unusual punishment.

This Honorable Court, in *Moore* v. *Dempsey,* 261 U. S. 86, perceived that a proceeding legal in form could be but a mask. In the case at bar, the punishment for an attempt to commit an offense is made greater than the punishment for the completed offense.

It is evident that the defendants were sentenced to the penitentiary for the crime of assault with intent to commit mayhem under the following statute:

> "An assault with an intent to commit murder, rape, mayhem, robbery, larceny, or other felony, shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 58, Par. 23.)

Mayhem is defined as follows in the statute:

> "Whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one nor more than twenty years, or fined not exceeding $1,000, and confined in county jail not exceeding one year." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 448, Par. 207.)

So it will be seen that mayhem is a misdemeanor and not a felony (*Lamkin* v. *People,* 94 Ill. 501). This fact is recognized in *People* v. *Jankowski,* 327 Ill. 68, which went first to the Appellate Court.

The question respectfully submitted is, what is the proper construction? At common law mayhem was a fel-

ony. Common law crimes exist in this State. Can it be that the common law crime is meant? If so, the proof in the case at bar falls short and the indictment is insufficient.

We respectfully quote from *Walter* v. *Northern Ins. Co. of N. Y.*, 370 Ill. 283, 288:

> "It is a familiar rule of construction that statutes in derogation of the common law cannot be construed as changing the common law beyond what is expressed by the words of such statute or is necessarily implied from what is expressed. (*Thompson* v. *Weller*, 85 Ill. 197; *Canadian Bank of Commerce* v. *McCrea*, 106 *id.* 281; *Cadwallader* v. *Harris*, 76 *id.* 370.) It is also a familiar rule of construction that in construing statutes in derogation of the common law, it will not be presumed that an innovation thereon was intended further than that which is specified or clearly to be implied. *Smith* v. *Laatsch*, 114 Ill. 271; *Cadwallader* v. *Harris, supra.*"

We respectfully contend that the crime of attempt to commit the misdemeanor mayhem as defined by our statute falls under the following statute:

> "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one or more than five years; in all other cases, by fine not exceeding $300, or by confinement in the county jail not exceeding six months." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 581, Par. 1.)

If such construction is proper, it was error to receive the verdict in the case at bar. The court erred in overruling the motion for new trial and in sentencing the defendants to the penitentiary.

The mixup of Statutes is evident by a reference again to *Dahlberg* v. *People,* 225 Ill. 485. The defendant in the *Dahlberg* case was sentenced to the penitentiary for an attempt. This Honorable Court seems to have regarded an attempt to commit mayhem as an attempt to commit a felony where no express provision is made by law for the punishment of such attempt. We have seen that mayhem is not a felony and that the statutes do make provision for an assault to commit mayhem (Ill. Rev. Stat. 1937, Chap. 38, par. 23).

We respectfully submit that the record shows not only that the complaining witness was malingering and seeking money on a false claim, but the prosecutor, in his anxiety to secure a conviction, lent himself to the original unlawful scheme and deprived these petitioners of due process of law. What should have commenced and ended in a police court case was magnified to a penitentiary sentence.

Conclusion.

Appreciating the limits upon the jurisdiction of this Honorable Court, we respectfully represent that petitioners are labor officials who have worked up from the ranks and who have led clean lives, including service to their country, (all of which is shown by the record). They are in the penitentiary claiming to be innocent. We respectfully submit that the trial court deprived these petitioners of their rights and the Supreme Court of Illinois decided the case contrary to the decisions of that Honorable court in such a manner as to deprive these petitioners of due process of law as guaranteed by the Federal Constitution.

Respectfully submitted,

JOSEPH J. KOPKE and
HENRY HLAVACEK,
Petitioners,

WM. SCOTT STEWART,
Counsel for Petitioners.
77 West Washington Street,
Chicago, Illinois.